The Subjects of International Space Law

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Abstract

Entities enjoying international legal personality are generally regarded as the "subjects" of general international law and international space law and are considered to possess rights and obligations under international law. While States have historically been recognised as the principal subjects of international law, non-State actors, such as international organisations, non-governmental entities, multinational corporations, and (arguably) individuals, are increasingly empowered with rights and subjected to obligations on the international plane. International space law, although embedded in general international law, contains unique principles and rules that are in some cases different from those of general international law. With the changing nature of activities due to technological developments, and the proliferation of actors in the space domain, it is necessary to critically examine the issues as to what are considered the subjects of international space law. This question is important both from the doctrinal perspective, and as a matter of practical relevance, as space activities are increasingly being undertaken by non-State actors under the jurisdiction and control of, or having a nexus with, several States.

1. Introduction

Much has been written over the years on international space law, a subject matter of growing interest and challenge due to the proliferation of space activities and actors.[1] There is, however, little scholarship, on the *subjects* of

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1 See e.g. UNGA, *Declaration on the fiftieth anniversary of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,* UN Doc A/RES/72/78 (2017), para 9. See also UNCOPUOS, *Guidelines for the Long-term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space*, UN A/74/20 (2019), Ann II, para 1.

international space law.[2] Just as it is important for those researching and studying the governance of outer space[3] to understand the sources of international space law,[4] it is equally vital to have a clear understanding of how activities in outer space change the traditional notion of who or what the 'addressees' of international space law are. It is therefore necessary to critically revisit the matter of subjects of international space law. As former Judge Rosalyn Higgins noted, "the classic view has been that international law applies only to States [but] there is a growing perception that it is relevant to international actors other than States".[5] Indeed, the "extraordinary expansion of international law"[6] into new areas of regulation, including the global commons of outer space, requires a rethinking of the laws and subjects in new domains of human activity.

2. The Traditional Subjects of International Law and of International Space law

The seminal *Lotus* case held that international law "govern[ed] relations between independent States".[7] For a long time, States were perceived as being the only subjects, or legal persons, of international law, and any non-State entity could at most only be an "object" of international law.[8] As the primary subject of international law, a "State possesses the totality of international

2 For one example, albeit written in the early 1970s, see Ph. Diederiks-Vershoor & W. Paul Gormley, "Future Legal Status of Nongovernmental Entities in Outer Space: Private Individuals and Companies as Subjects and Beneficiaries of International Space Law" (1972) 5 J Space L 125.

3 UNCOPUOS, *Report of the Committee on the Peaceful Uses of Outer Space*, UN Doc A/74/20 (2019), para 349.

4 Ram Jakhu, Steven Freeland and Kuan-Wei Chen, "The Sources of International Space Law: Revisited" (2018) 67 ZLW 606.

5 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon, 2000), 39. Discussing the history and philosophy of international law, Anthony Carty wrote that international law "accepts states as the primary subjects of the system, in accordance with a more or less explicit principle of effectiveness": *Philosophy of International Law*, (Edinburgh: University of Edinburgh, 2017) at 81.

6 Antônio Augusto Cançado Trindade, *International Law for Humankind* (Brill: 2010), 170.

7 *The Steamship Lotus (France v. Turkey)* (1927), PCIJ, Ser A, No 10 at 18.

8 Robert McCorquodale, "Sources and the Subjects of International Law: A Plurality of Law-Making Participants" 749 in Jean d'Aspremont & Samantha Besson, eds, *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017) at 750. See also Diederiks-Vershoor & Gormley, "Future Legal Status of Nongovernmental Entities in Outer Space", *supra* note 2 at 130.

rights and duties recognized by international law",[9] including the right to bring international claims to defend those rights and to be party to claim adjudicating its duties.[10]

As international law progressed from the law of international co-existence to the law of international cooperation,[11] new entities on the international plane were created and recognised as new legal persons. As the foremost multilateral institution fostering international cooperation, the United Nations (UN) was endowed and recognised as possessing "objective international personality" and "the capacity to bring international claims".[12] Indeed, the International Court of Justice (ICJ) clarified that, as subjects of international law, States "possess a general competence" to exercise rights and shoulder obligations,[13] whereas an international organisation[14] is a creation of States vested with powers, "the limits of which are a function of the common interests whose promotion those States entrust to them".[15]

A cursory look at the UN space law treaties[16] reveals that States, and to some extent, international organisations, are, like under general international law,

9 *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, [1949] ICJ Rep 174 [*Reparation for Injuries*], 180. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66 [*Legality of Nuclear Weapons*], para 25.

10 *Reparation for Injuries, supra* note 9, at 179. See also James Crawford, *Brownlie's principles of public international law* (Oxford: Oxford University Press, 2019), 115:
A subject of international law is an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims; and (b) to be responsible for its breaches of obligation by being subjected to such claim.
See also David Feldman, "International personality" (1985) 191 Recueil des cours 343, 357; 370-371.

11 See generally, Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964).

12 *R Reparation for Injuries, supra* note 9, 185. See also, *Jurisdiction of the European Commission of the Danube (Advisory Opinion)* [1927] PCIJ Series B, No 14, which held that international organisations created for a special purpose hold limited legal personality (at 64).

13 *Legality of Nuclear Weapons, supra* note 9, para 25.

14 At times, such as in the space law treaties, referred to as international intergovernmental organisations: see *Vienna Convention on the Law of Treaties*, 23 May 1969, UN Doc A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969) (entered into force 27 January 1980) [*VCLT*]., art 2(i); and *Outer Space Treaty*, *infra* note 16, art XIII.

15 *Legality of Nuclear Weapons, supra* note 9, para 25; see *Reparation for Injuries, supra* note 9, 180. *See also Jurisdiction of the European Commission of the Danube (Advisory Opinion)* [1927] PCIJ Series B, No 14 at 64.

16 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 January 1967, 610

the primary subjects of international space law. Even the latest UN Long-Term Sustainability Guidelines, adopted after a decade of negotiations as the most comprehensive "compendium of internationally recognized measures" for ensuring the long-term sustainability of outer space activities, notes that the Guidelines are formulated "in the spirit of enhancing the practice of *States and international organizations*".[17]

In terms of rights, States enjoy the freedom to explore and use space, including the Moon and other celestial bodies, in accordance with international law, as well as the freedom of "scientific investigation" in space.[18]

States also retain "jurisdiction and control" over any object "on whose registry an object launched in outer space is carried", and "over any personnel thereof".[19] Article XIII of the Outer Space Treaty holds that the provisions governing the rights and duties of States Parties to the Treaty also apply to international organisations.[20]

Among a myriad of other obligations, under the UN space treaties, States bear international responsibility for "national activities in outer space,[21]

UNTS 205 (entered into force 10 October 1967) [*Outer Space Treaty*]; the *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, 19 December 1967, 19 UST 7570 (entered into force 3 December 1968) [*Rescue and Return Agreement*]; the *Convention on International Liability for Damage Caused by Space Objects*, 29 November 1971, 24 UST 2389 (entered into force 1 September 1972) [*Liability Convention*]; the *Convention on the Registration of Objects Launched into Outer Space*, 12 November 1974, 1023 UNTS 15 (entered into force 15 September 1976) [*Registration Convention*]; and the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, 5 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) [*Moon Agreement*].

17 UNCOPUOS, *Guidelines for the Long-term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space*, UN A/74/20 (2019), Annex II, para 15 [emphasis added].

18 *Declaration of Legal Principles Concerning the Activities of States in the Exploration and Use of Outer Space*, GA Res 1962 (XVIII), UNGAOR, 18th Sess, UN Doc A/RES/18/1962 (1963) [*Declaration of Legal Principles*], para 2; *Outer Space Treaty*, *supra* note 16, art I.

19 *Declaration of Legal Principles*, *supra* note 18, para 7; *Outer Space Treaty*, *supra* note 16, art VIII. Indeed, the Registration Convention (Article VII), Liability Convention (Article XXII) and Moon Agreement (Article 16) apply to an international organisation if the organisation "declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles": see example of INTERSPUTNIK, *infra* note 55.

20 *Outer Space Treaty*, *supra* note 16, art XIII: international responsibility is borne by the international organisation and State Parties to the Treaty participating in such organisation (article VI).

21 *Declaration of Legal Principles*, *supra* note 18, para 5; *Outer Space Treaty*, *supra* note 16, art VI.

States, in particular the "launching States" shoulder international liability for damage caused by its space object,[22] and States have the duty of due regard to the corresponding interests of other States in the conduct of their space activities, as well as the duty to consult in the event a space activity or experiment "would cause potentially harmful interference with activities of other States".[23]

Below, we consider the traditional and non-traditional actors in space, including States, international organisations, and non-governmental entities such as corporations and individuals. In doing so, we will consider how in the exploration and use of outer space, these actors have acquired rights and responsibilities that would qualify them as subjects of international space law.

2.1. States

Sovereign States are the principal actors of international law, and they possess the right to perform acts under international law as well as bear responsibility for wrongful acts attributable to it.[24] The definition of a State has been widely accepted under international law. In the Draft Declaration on the Rights and Duties of States, the International Law Commission (ILC) underlined the understanding of State has been "commonly accepted in international practice" and that it was not necessary to "set forth […] the qualifications to be possess by a community in order that it may become a State".[25] Writing in 1995, Higgins noted that the "definition of 'a State' has remained virtually unchanged" since the Montevideo Convention on the Rights and Duties of States.[26] As the primary "person of international law", a State "*should*" possess "a) permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States".[27] These criteria for assessing statehood, and thereby the capacity of an entity to possess full rights and duties as a legal person on the international plane, have almost been uniformly adopted by States worldwide.[28]

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22 *Declaration of Legal Principles*, *supra* note 18, para 8; *Outer Space Treaty*, *supra* note 16, art VII; and *Liability Convention*, *supra* note 16.

23 *Declaration of Legal Principles*, *supra* note 18, para 6; *Outer Space Treaty*, *supra* note 16, art IX.

24 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp (No. 10) at 43, UN Doc A/56/83 (2001) [*Articles on State Responsibility*].

25 *Draft Declaration on Rights and Duties of States with Commentaries*, Yearbook of the International Law Commission (1949) at 289.

26 *Convention on the Rights and Duties of States*, 26 December 1933 (entered into force 26 December 1934) [*Montevideo Convention*].

27 *Ibid*, art 1 [emphasis added].

28 International Law Association, Sydney Conference (2018), *Recognition/Non-Recognition in International Law*, online: *ILA* <www.ila-hq.org/images/ILA/

However, throughout history, the "component elements" of what constitute a State "have always been interpreted and applied flexibly, depending on the circumstances and the context in which the claim of statehood is made".[29] Notwithstanding the complex and political issue of recognition of States,[30] there are ample examples of entities that lack one or more of the component elements of statehood and are still a member of the international community. India, for instance, was a "State" party to the 1865 Convention of the International Telegraph Union (which later became International Telecommunication Union, ITU),[31] the 1944 Chicago Convention,[32] and the Charter of the UN,[33] even though it only obtained independence from the UK in — and did not possess full sovereignty until — August 1947. Palestine, whose declaration of independence took effect on 15 December 1988,[34] has been party to the Agreement of the Arab Corporation for Space Communications (ARABSAT)[35] since its adoption in 1976.

The addressees of space law remain essentially States.[36] The nexus to the State which launches the relevant space object,[37] or which registers the launch

DraftReports/DraftReport_Recognition.pdf>, 3-4. Though, the ILA notes that the "ongoing relevance of the Montevideo criteria is best understood not as a single bright-line rule of what makes a State but as a core set of attributes. The more an entity can demonstrate these attributes, then the more persuasive may be its argument for statehood": at 6.

29 Higgins, *Problems and Process, supra* note 5, 39.

30 See generally, International Law Association, *Recognition/Non-Recognition in International Law*, sect B.

31 ITU, "List of Member States", online: *ITU* <www.itu.int/online/mm/scripts/gensel8>. It may also be noted that India joined the Universal Postal Union on 1 July 1876. See: UPU, "Member Countries", online: *UPU* <www.upu.int/en/the-upu/member-countries/southern-asia-and-oceania/india.html>.

32 *Convention on International Civil Aviation*, 7 December 1944, 15 UNTS 295, ICAO Doc 7300/6 (entered into force 4 April 1947) [*Chicago Convention*]. India became a State Party on 1 March 1948: see ICAO, "Convention on International Civil Aviation, signed at Chicago on 7 December 1944", online: *ICAO* www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf.

33 India ratified the UN Charter on 30 October 1945: UN, "Multilateral Treaties Deposited with the Secretary-General", Chapter I: Charter of the United Nations and Statute of the International Court of Justice", online: *UN* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_en>.

34 UNGA, *Question of Palestine,* UNGA Res 43/177, UNGAOR 43rd Sess, UN Doc A/RES/43/177 (1988).

35 *Agreement of the Arab Corporation for Space Communications*, 14 April 1976 (entered into force 16 July 1976).

36 As well as international organisation that declare the acceptance of particular space treaties. Cheng (1997), 72; see also Diederiks-Vershoor & Gormley, "Future Legal Status of Nongovernmental Entities in Outer Space", *supra* note 2.

of that space object,[38] remains the focus on rights and obligations under international space law. This launching State-centric and terrestrial-bound focus the regulation of space activities will present various practical problems in future and more prolonged space ventures and settlements. Historically grounded terrestrial concepts like territory and sovereignty are widely regarded as being non-applicable to the fundamentals of international space law, and probably even outright prohibited in outer space.[39]

2.2. International Organisations

As mentioned above, the UN was the first international organisation recognised by an international court as possessing "objective international personality" and "the capacity to bring international claims" on the international plane.[40] International organisations[41] possess only those rights and duties prescribed by its "purposes and functions as specified or implied in its constituent documents and developed in practice".[42] The ICJ has unequivocally held that international organisations "are subjects of international law",[43] meaning the organisation is "capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[44] Indeed, an international organisation is deemed to possess "its own international legal personality",[45] which in the space context is clearly stipulated in the constituent documents of, for example, the European Space Agency (ESA),[46] the Asia-Pacific Space

37 This includes the State which conducts the launch, the State which procures the launch, or the State from whose facility or territory the launch is conducted. *Liability Convention, supra* note 16, art 1(c).

38 *Outer Space Treaty*, *supra* note 16, art VIII; and, generally, the *Registration Convention*, *supra* note 16.

39 *Outer Space Treaty*, *supra* note 16, art II.

40 *Reparation for Injuries, supra* note 9, 185. See also, *Jurisdiction of the European Commission of the Danube (Advisory Opinion)* [1927] PCIJ Series B, No 14, which held that international organisations created for a special purpose hold limited legal personality (at 64).

41 At times, such as in the UN space law and some other treaties, referred to as international intergovernmental organisations: see VCLT, *supra* note 14, art 2(i); and *Outer Space Treaty*, *supra* note 16, art XIII.

42 *Reparation for Injuries, supra* note 9, 180. See also UNGA, *Report of the Report of the International Law Commission, Sixty-third session,* "Draft Articles on the Responsibility of International Organizations", UN Doc A/66/10 (2011), art 2(a) [*Draft Articles on the Responsibility of International Organizations*].
Draft Articles on the Responsibility of International Organizations, art 2(a).

43 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 80, para 37.

44 *Reparation for Injuries, supra* note 9, at 179.

45 *Draft Articles on the Responsibility of International Organizations, supra* note 42.

46 *Convention for the Establishment of the European Space Agency*, 30 May 1975, CSE/CS(73)19, rev.7 (entered into force 30 October 1980), art XVI(1).

Cooperation Organization (APSCO),[47] and such regional space organisations as INTERSPUTNIK,[48] EUMETSAT,[49] and EUTELSAT.[50] It may be noted these were the first international entities that were "operational international organisations" mandated with responsibility for providing actual services as opposed to "consultative international organisations" such as the likes of the UN and ITU. Before their privatisation, the International Telecommunications Satellite Organization (INTELSAT)[51] and the International Maritime Satellite Organization (INMARSAT)[52] were endowed with legal personality under their respective constitutive instruments.

Article XIII of the Outer Space Treaty holds that the provisions governing the rights and duties of States Parties to the Treaty also apply to international organisations. In 2019, INTERSPUTNIK voluntarily declared to comply with the provisions of the Outer Space Treaty and accept responsibility for compliance with Article VI of the Treaty.[53] This raises the issue of whether a unilateral declaration by an international organisation would similarly bind a State that made a unilateral declaration.[54] Further, INTERSPUTNIK has also declared its acceptance of other UN space law treaties.[55]

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47 *Convention of the Asia-Pacific Space Cooperation Organization*, 28 October 2005, 2423 UNTS 127 (entered into force 12 October 2006), art 3.

48 *Agreement on the Establishment of the Intersputnik International System and Organization of Space Communications,* 15 November 1971 (entered into force 12 July 1972), art 8.

49 *Convention for the Establishment of a European Organisation for the Exploitation of Meteorological Satellites,* 24 May 1983, 1434 UNTS 3 (entered into force 19 June 1986), art 1(3).

50 *Convention establishing the European Telecommunications Satellite Organization EUTELSAT,* 15 July 1982, 1519 UNTS 149 (entered into force on 1 September 1985), art IV(a)-(b).

51 *Agreement Relating to the International Telecommunications Satellite Organization* (INTELSAT), 20 August 1971, 23 UST 4091, 1220 UNTS 149 (entered into force on 12 February 1973), art IV.

52 *Convention on the International Maritime Satellite Organization (INMARSAT),* 3 September 1976, 1143 UNTS 105, art 25.

53 See *Protocol of the joint 46th session of the Board and 21st session of the Operations Committee of the Intersputnik International Organization of Space Communications* (20 June 2018, Ulaanbaatar, Mongolia), item 10 of the agenda titled "Acceptance by the Intersputnik International Organization of Space Communications of the rights and obligations under the United Nations treaties on outer space". See also UNOOSA, *Information on the activities of international intergovernmental and non-governmental organizations relating to space la*w, UN Doc /AC.105/C.2/2019/CRP.25 (2019), A.

54 See ILC, *Guiding Principles applicable to unilateral declarations of States*, UN doc A/61/10 (2006), 369 *et seq*.

55 *Declaration on the Acceptance by the Intersputnik International Organization of Space Communications of the Rights and Obligations Under the United Nations Treaties on Outer Space* dated 9 July 2018, online: INTERSPUTNIK <intersputnik.com/press-center/magazine/download.php?name=Declaration%20(UN%20treaties%20on%20

2.3. Individuals

Under the Outer Space Treaty, there is explicit reference to "astronauts as envoys of mankind", who are entitled to "all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas", as well as the safe and prompt return "to the State of registry of their space vehicle".[56] These rights and associated obligations upon relevant State Parties are further elaborated in the Rescue Agreement.[57] This appears to be the only expressly discernible entitlement of individuals under international space law. Space law more generally dictates that the State of nationality would bear international responsibility for activities carried out by "non-governmental entities".[58] Non-governmental entities, including individuals who conduct space activities, are required to be authorised and continually supervised by "the appropriate State".[59]

The increasing role of non-governmental entities and individuals in the conduct of space activities and utilisation of space assets raise questions as to whether individuals could also be entitled to further rights and duties in outer space. The major impediment to individuals asserting legal personality akin to those of States and international organizations is that, apart from under specific regional and international human rights regimes as referred to below, individuals do not enjoy *locus standi* before international fora.[60] The ICJ's predecessor in *Danzig* held that an international agreement "creates rights and obligations between the contracting Parties only [and cannot] create direct rights or obligations for […] individuals".[61] Indeed, individuals can best assert their rights by way of diplomatic protection, which is the preserve of the State of nationality,[62] for individuals "have no remedy in international law".[63] As *Barcelona Traction* confirmed:

> a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting […] The State

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outer%20space).pdf&link=/upload/iblock/acb/declaration-_un-treaties-on-outer-space_.pdf>. See also UNOOSA, *Information on the activities of international intergovernmental and non-governmental organizations relating to space la*w, *supra* note 53.

56 *Outer Space Treaty*, *supra* note 16, art V.

57 *Rescue and Return Agreement, supra* note 16.

58 *Outer Space Treaty, supra* note 16, art VI.

59 *Ibid*, art VI.

60 Diederiks-Vershoor & Gormley, "Future Legal Status of Nongovernmental Entities in Outer Space", *supra* note 2 at 130.

61 *Jurisdiction of the Courts of Danzig* (1928) PCIJ (Ser B) No. 15 at 17.

62 Draft Articles on Diplomatic Protection, art 3;

63 *Case concerning the Barcelona Traction, Light and Power Company (Belgium v. Spain)* [1970] ICJ Rep 44, para 78 [*Barcelona Traction*].

> must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease.[64]

The atrocities of the world war resulted in the recognition by the International Military Tribunal that "international law imposes duties and liabilities upon individuals as upon States".[65] This has more recently been affirmed under the Rome Statute of the International Criminal Court, which holds that the Court has "jurisdiction over *natural* persons",[66] and that a person "who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment".[67]

Indeed, the "humanization" of international law[68] with the increasing emphasis on international humanitarian law, human rights law, and international criminal law, show a trend towards recognizing that individuals may have (international) rights that can be asserted as well as placing criminal responsibility directly on individuals. Both the Optional Protocol to the International Covenant on Civil and Political Rights[69] and the International Covenant on Economic, Social and Cultural Rights[70] confirm that individuals have the right, in applicable circumstances, to initiate and pursue a claim against State Parties. The European Convention on Human Rights, at the regional level, recognizes an individual's right to assert rights stipulated under the Convention.[71]

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64 *Ibid*, para 78-79. See also *Mavrommatis Palestine Concessions Case (Jurisdiction)* [1924] PCIJ (ser A) No 2, 112:
> By taking up the case of one of its subjects and resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law.

65 *France v Hermann Göring*, Judgment and Sentence (30 September 1946), para 243.

66 *Statute of the International Criminal Court,* 17 July 1998 (entered into force 1 July 2002) [*Rome Statute*], art 25(1) [emphasis added].

67 *Ibid*, art 25(2).

68 See generally Antônio Augusto Cançado Trindade, *International law for humankind: towards a new jus gentium (II): general course on public international law* (2005) 317 Recueil des cours 1, 19 *et seq*.

69 *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2 (entered into force 23 March 1976) [*ICCPR Optional Protocol*].

70 UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN Res 63/117 (2009), art 2 [*ICESCR Optional Protocol*].

71 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 04 November 1950, ETS 5, art 34. There have been claims affirming the right to a free and fair public hearing by an independent and impartial tribunal (*Sovtransavto Holding v. Ukraine*, [2002] ECHR 626); access to a court (*Silvester's Horeca Service v. Belgium*,

Arguably, since outer space activities must be conducted in accordance with international law, rights and duties of individuals may be asserted also in relation to the exploration and use of outer space. Indeed, while the crew and space flight participants are burdened with several obligations prior to being authorized to partake in space mission,[72] the question arises as to how such individuals involved in space flights can assert their rights under some space treaties.

The extension of international law into outer space necessitates the adaptation of the relevant body of law "to the needs and characteristics of the new dimension".[73] It is important for scholars and policy-makers "to consider if and to what extent the opening up of the [space] dimension may affect" the operation of various branches of international law,[74] which encompasses the rights and duties of individuals.

2.4. Corporations

There exists considerable ongoing scholarly debate as to whether entities such as multinational enterprises[75] or transnational corporations[76] are to be

[2004] ECHR 97); and freedom of the press (*Sunday Times v. United Kingdom*, [1979] ECHR 1).

72 For instance, under US national law, the crew must complete training and possess certain qualifications and skills sufficient for the space flight (14 CFR § 460.5). Similarly, the space flight participant must possess knowledge of "how to respond to emergency situations, including smoke, fire, loss of cabin pressure, and emergency exit (14 CFR § 460.51), and may not carry on board "any explosives, firearms, knives, or other weapons" (14 CFR § 460.53). The operator or the flight crew must be provided with certain "atmospheric conditions adequate to sustain life and consciousness for all inhabited areas within a vehicle" (14 CFR § 460.11).

73 Tanja L. Masson-Zwaan & Stephan Hobe, eds, *Manfred Lachs, An Experience in Contemporary Law-Making, by Manfred Lachs, Reissued on the occasion of the 50th anniversary of the International Institute of Space Law* (Leiden: Martinus Nijhoff Publishers, 2010), 13.

74 *Ibid*, 14.

75 Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises 2011 edition*; online (pdf): OECD </www.oecd.org/corporate/mne/1922428.pdf>; International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th Session (November 2000), 295th Session (March 2006) and 329th Session (March 2017); online(pdf): International Labour Office, online: <www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf>.

76 UN, Economic and Social Council, Commission on Human Rights: Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, 26 August 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 at 7: "The term 'transnational corporation' refers to an economic entity operating in more than one

regarded as subjects of international law in certain circumstances. This is of relevance when considering the multinational nature of space launches,[77] and the growing incidence of on-orbit transfer of space objects that involves various jurisdictions. Similar to individuals, in general, the exercise of the right of diplomatic protection on behalf of a corporation is at the discretion of the State where the corporate entity is incorporated and in whose territory it has its registered office.[78]

Corporations do have some limited rights and obligations in the international plane. At the regional level, the European Convention on Human Rights stipulates that a claim may be filed "from any person, nongovernmental organisation or group of individuals".[79] Indeed, Protocol 1 to the Convention notes that "every natural or legal person is entitled to the peaceful enjoyment of his possessions".[80] However, these limited rights have only been recognised and accepted by the European Court, and there are no provisions under international human rights law affirming such rights for enterprises.

Under international investment law, corporations enjoy a robust set of rights and protections which are typically captured under bilateral investment treaties.[81] Provisions on dispute settlement typically contained in a bilateral investment treaty furnish a person, whether a natural or legal one, with the right to initiate proceedings in the legal system of a host country, initiate arbitration proceedings under the United Nations Commission on International

country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."

77 As the situation has been the case of SeaLaunch: see Space Legal Issues, "Sea Launch and Launching States", online: *Space Legal Issues* <www.spacelegalissues.com/sea-launch-and-launching-states>.

78 *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), [1970] ICJ Rep 3, para 70. Note, however, that Article VIII of the Liability Convention extends the normal rules of international law as to which State is permitted to bring an action under that Treaty on behalf of a non-governmental 'victim' that has suffered damage.

79 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 04 November 1950, ETS 5, art 34. There have been claims affirming the right to a free and fair public hearing by an independent and impartial tribunal (*Sovtransavto Holding v. Ukraine*, [2002] ECHR 626); access to a court (*Silvester's Horeca Service v. Belgium*, [2004] ECHR 97); and freedom of express (*Sunday Times v. United Kingdom*, [1979] ECHR 1).

80 *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, art 1.

81 See e.g. *United States-Uruguay Bilateral Investment Treaty*, 11 April 2005 (entered into force 31 October 2006).

Trade Law (UNCITRAL) Arbitration Rules,[82] or institute proceedings under the auspices of the International Centre for Settlement of Investment Disputes (ICSID).[83]

While corporations enjoy certain rights and can make an international claim, unlike individuals, corporations have historically had little by way of obligations under international law, although there is an increasing trend towards finding ways of holding, in particular, multinational corporations responsible at the national but also international level for damage caused by their activities or other forms of what is regarded as unacceptable behaviour under the rubric of 'corporate social responsibility'.[84] Thus, while States are primarily responsible for respecting and ensuring protection of human rights of its individual nationals or citizens, corporations do not have such obligations.[85] While many provisions of the Universal Declaration of Human Rights have crystallised as customary international law, "it [is] generally agreed that they currently apply only to States (and sometimes individuals)", and therefore would not establish legal responsibilities for corporations.[86]

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82 United Nations Commission on International Trade Law, *Arbitration Rules of the United Nations Commission on International Trade Law*, UN Doc A/RES/31/98 (1976).

83 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

84 See Social and Economic Council of the Netherlands (SER), "Agreements on International Responsible Business Conduct", online: *SER* <www.imvoconvenanten.nl/en>; and the Mediation and Complaints-Handling Institution for Responsible Business Conduct, "The OECD Guidelines", online: <businessconduct.dk/oecd-guidelines>.

85 UNGA, Human Rights Council, *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/14/27 (2010) at 12; para 55.

86 UNGA, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council': Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,* UN Doc A/HRC/4/35 (2007), para 38. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950, ETS 5) applies only to "High Contracting Parties" (art 1). Likewise, under the ICCPR, "obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law": UN Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), para 8. The International Covenant on Economic, Social and Cultural Rights (ICESCR) has stated that private enterprises— national and multinational—have only a particular role to play in job creation, hiring policies and non-discriminatory access to work: UN, Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The*

Likewise, in the field of international environmental law, the addressees of international conventions are States Parties.[87] A few specialised agreements establish civil liability rules for private actors which have the potential to cause grave environmental damage on Earth,[88] such as oil spills or nuclear leakages.[89] However, all of these instruments rely on domestic implementation, and require the contracting parties to establish the necessary enforcement mechanisms.[90] Other regional and multilateral international conventions, such as the Convention on the Protection of the Environment through Criminal Law,[91] only impose national criminal or administrative sanctions on legal persons.[92] In the near future, in the use of outer space, particularly the extraction of in situ space resources on the Moon or other celestial bodies (including asteroids), it is conceivable that a corporation may cause environmental damage. Would it be sufficient for the activities of such corporations to be regulated under national space legislation, as a consequence of the obligations imposed on States under Article VI of the Outer Space Treaty? In addition, how can a claim for compensation be made against such a corporation, if indeed it is a subject of international law, especially in circumstances where that corporation has declared bankruptcy under the national law of the State of its incorporation?

Right to Work, UN Doc E/C.12/GC/18 (2005), para 38. The UN Economic and Social Council adopted the *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,* UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003), which is a non-binding instrument.

87 UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly*, 20 January 1994, A/RES/48/189; and *Paris Agreement*, 12 December 2015 (entered into force 4 November 2016).

88 Jan Wouters & Anna-Luise Chané, "Multinational Corporations in International Law", Working Paper No. 129 – December 2013, Leuven Centre for Global Governance Studies.

89 *International Convention on Civil Liability for Oil Pollution Damage*, adopted 29 November 1969, entered into force 19 June 1975, 973 UNTS 3; *Vienna Convention on Civil Liability for Nuclear Damage*, adopted 21 May 1963, entered into force 12 November 1977, 1063 UNTS 265.

90 Jan Wouters & Anna-Luise Chané, "Multinational Corporations in International Law", Working Paper No. 129 – December 2013, Updated February 2015, Leuven Centre for Global Governance Studies, Institute for International Law in Math Noortmann, August Reinisch & Cedric Ryngaert (eds.), *Non-State Actors in International Law* (Hart Publishing: 2015), c 11 at 225-252.

91 *Convention on the Protection of the Environment through Criminal Law*, 4 November 1998, 38 ILM 259 (1999), ETS No. 172.

92 *Ibid*, Preamble: "Convinced that imposing criminal or administrative sanctions on legal persons can play an effective role in the prevention of environmental violations and noting the growing international trend in this regard"; see also art 9.

Under international criminal law, despite a reference to legal persons under an earlier draft,[93] the Rome Statute of the International Criminal Court provides for the Court's jurisdiction over natural persons only.[94] It is for the States Parties "adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons …"[95] Likewise, Article 26(1) of the United Nations Convention Against Corruption stipulates that "State Party(ies) shall adopt such measures as may be necessary … to establish the liability of legal persons for participation in the offences established in accordance with this Convention".[96]

Thus, to summarise, there are few (though perhaps increasing) discernible rights and obligations or duties of multinational enterprises/transnational corporations under international law. Indeed, the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes relating to Outer Space Activities,[97] which is based on the 2010 UNCITRAL Arbitration Rules, were adopted in order to "reflect the particular characteristics of disputes having an outer space component involving the use of outer space by States, international organisations and *private entities*".

However, as private corporations become more involved in the conduct of space activities, particularly with the trend toward privatisation and commercialisation, there is a recognition of the legal standing of these entities under international space law. With the off-world ventures that are far removed from where the source and enforcement of the regulation of space activities are situated, the "exercise of jurisdiction and control by the State (or States) of registry may become difficult, it may even become impractical and impossible".[98] A key question, which goes to the heart of the

93 UN, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June - 17 July 1998, Official Records, Volume III, UN Doc A/CONF.183/13(Vol. Ill) at 13: *Draft Statute for the International Criminal Code 1998*, art 23(5): "The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such *legal persons or by their agencies or representatives*." [emphasis added].

94 *Statute of the International Criminal Court*, UN Doc A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, art 25(1).

95 *Ibid*, art 9.

96 UNGA, *United Nations Convention Against Corruption*, 31 October 2003, UN Doc A/58/422, art 26(1).

97 Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes relating to Outer Space Activities*, 6 December 2011, online: *Permanent Court of Arbitration* <pca-cpa.org/wp-content/uploads/sites/6/2016/01/Permanent-Court-of-Arbitration-Optional-Rules-for-Arbitration-of-Disputes-Relating-to-Outer-Space-Activities.pdf> [emphasis added].

98 Ernst Fasan, "Human Settlements on Planets: New Stations or New Nations" (1994) 22 Journal of Space Law 47, 53.

effectiveness of space law in the near-future, when activities conducted by private individuals and corporations are more prevalent, is how the enforcement of decisions under the PCA Optional would be imposed.

2.5. Humankind as a Subject of International Law

As Judge Antônio Augusto Cançado Trindade wrote, while States will still remain a predominant subject of international law, in light of "general and superior interests of the international community",[99] there are matters of common concern and interests that prevail over the individualist and State-centric mindset. The protection of the environment, the overriding objective of "general and complete" disarmament and, we would postulate, the exploration, use and sustainability of outer space, fall under such general public interest.[100] In the *Legality of Nuclear Weapons,* President Bedjaoui noted the recognition and rise of such concepts as "obligations *erga omnes*, rules of *jus cogens*, or the common heritage of mankind" as evidence of the emergence and "subjectivization" of the international community.[101] This suggests that concepts such as the "international community" or "humankind" may at some stage perhaps represent, albeit as abstract, another form of subject of international law that will play an increasingly role in the formation and furtherance of international legal system.

Indeed, there are repeated mentions of the "common interest" of all peoples and humankind,[102] and the fact that the exploration and use of space is the "province" of humankind.[103] The Moon Agreement goes further to stipulate that the Moon and its natural resources "are the common heritage of mankind",[104] and that the exploration and the Moon shall be done paying

99 Antônio Augusto Cançado Trindade, *International Law for Humankind,* 275. See also Philip Allott, Eunomia—New Order for a New World (Oxford: Oxford University Press, 1990).

100 Ram Jakhu, "Legal Issues Relating to the Global Public Interest in Outer Space" (2006) 32 Journal of Space Law 31

101 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996], ICJ Reports 226, Declaration of President Bedjaoui, para 13.

102 The preambles of the Outer Space Treaty, Liability Convention and the Registration Convection all repeat the recognition that it is the "common interest of all mankind in furthering the exploration and use of outer space for peaceful purposes". See also *Declaration of Legal Principles*, and the *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, GA Res 51/122, UNGAOR, 51st Sess, UN Doc A/RES/51/122 (1996) [*Space Benefits Declaration*]. The Rescue and Return Agreement is adopted based on "the sentiments of humanity" (Preamble).

103 *Outer Space Treaty*, *supra* note 16, art I.

104 *Moon Agreement*, *supra* note 16, art 11.

due regard "to the interests of present and future generations".[105] Other space law principles, such as those governing remote sensing and direct broadcasting, refer to the peculiar and specific circumstances and interests of each (relevant) State that must be considered so as to ensure that activities do not unduly prejudice any one State's interests.[106]

Perhaps of more tangible relevance, at least at this juncture, the regulation of the radiofrequency spectrum under the regime of the International Telecommunication Union underlines that scarce space resources must be "used rationally, efficiently and economically" and in such a manner that "countries or groups of countries may have *equitable access* to those orbits and frequencies, taking into account the special needs of the developing countries and the geographical situation of particular countries".[107] The mention of equity, which has been held to be a general principle of law in appropriate circumstances,[108] underlines that the governance of space must balance and bridge the diverging (or conflicting) interests of States in different stages of economic development, and the needs of present and future generations.[109]

Though the notion of an entity called "humankind" that is endowed with rights and responsibilities may be noble, it does raise many, as yet unresolved questions: who or what should speak on behalf of or is entitled to make a claim on behalf of humankind?[110] Perhaps attention can be turned to the ILC Articles of State Responsibility, which permits any State to invoke the responsibility of another State if the obligation breached is owed to the State itself, or "[a] group of States including that State, *or* the international community as a whole".[111] Article 48 of the same instrument stipulates that "[a]ny State other than an injured State is entitled to invoke the responsibility

105 *Ibid*, art 4(1).

106 *Outer Space Treaty*, *supra* note 16, arts IX and X. see also *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, GA Res 37/92, UNGAOR, 37th Sess, UN Doc A/RES/37/92 (1982), Principle C; *Principles relating to Remote Sensing of the Earth from Space*, GA Res 41/65, UNGAOR, 41st Sess, UN Doc A/RES/41/65 (1986), Principle V; and *Space Benefits Declaration*, *supra* note 102, paras 2, 3.

107 *Constitution and the Constitution and Convention of the International Telecommunication Union*, 1994 (as amended in 2014) and *ITU Radio Regulations*, Edition of 2015 (as amended), art 44(2) [emphasis added].

108 See also *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, [1982] ICJ Rep 18, para 71.

109 See Franceso Francioni, "Equity in International Law" (2013) MPEPIL (online). See also Edith Brown Weiss, "Intergenerational Equity" (2013) MPEPIL (online); and Emanuel Agius & Salvino Busuttil, *Future generations and international law* (London: Earthscan, 1998).

110 Kuan-Wei Chen, *In Search of the International Community (of States)*, (LLM Thesis, Leiden University, 2008) (unpublished) at 50.

111 *Articles on State Responsibility*, *supra* note 24, art 42.

of another State if […] the obligation breached is owed to the international community as a whole".[112] In light of the proceedings initiated by The Gambia against Myanmar before the ICJ,[113] the potential remains for a State that is not directly injured by alleged atrocities to make a claim ostensibly on behalf of humanity, although, in that specific case, the claim is, in its basic form, a dispute between two States Parties to the Genocide Convention.[114]

3. Conclusions

International personality has traditionally been "widely used to signal the capacity of an entity to act on the international plane".[115] Possessing legal personality, and therefore the ability to assert rights, shoulder responsibilities, as well as participate in claims to defend those rights or adjudicate responsibility, are the hallmarks of being a subject of international law, including international space law. Though States have historically been the primary subject of international law, the evolution of international law, and the recognition of common interests in light of the extension of law to govern new commons and activities, has resulted in international organisations and, to a more limited extent non-State actors and individuals, gaining acceptance as recognised subjects of international law under certain circumstances.

Already in 1963, it was predicted that non-governmental entities, including individuals, would play an increasingly important role in the exploration and use of outer space.[116] The considerable development in the nature of space activities has expanded the range of the "body of actors of the international system and therefore the circle and character of international persons".[117] As the ICJ already pointed out over seven decades ago,

112 See Nicholas Tsagourias, 'International Community, Recognition of States, and Political Cloning', in Colin Warbrick and Stephen Tierney, *Towards an 'International Legal Community'?: The Sovereignty of States and the Sovereignty of International Law*, (British Institute of International and Comparative Law: London (2006) 212-213.

113 See Verbatim record 2019/19, "Public sitting held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace, President Yusuf presiding, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)"*, para 56 et seq, online: *ICJ* <www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BI.pdf>.

114 *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

115 Shabtai Rosenne, "International personality" (2001) 291 Recueil des cours 261 at 261.

116 See Myres McDougal, Harold Lasswell & Ivan Vlasic, *Law and Public Order in Space* (New Haven: Yale University Press, 1963).

117 Feldman, *supra* note 10, 351.

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.[118]

The increased "humanisation" of international law has meant that non-State entities such as transnational corporations and individuals have become more than an object of international law, and their participation in space activities, and their influence on the formation of norms governing space activities, cannot be easily dismissed.

In the (perhaps) not so distant future, celestial bodies "*will* be inhabited; […] minerals *will* be used; inhabitants *will* move through such territory, and the "rules of conduct" *will* be valid within such an area".[119] It is one thing to assert that rules will be valid, it is altogether another matter whether the rules are adequate to identify their subjects and to address and regulate the unique nature of activities in an extra-terrestrial context. In our view, further research is needed (a) to precisely determine the *lex lata* governing the subjects of international space law; and, (b) more importantly, to make proposals for *lex de ferenda* so that all actors involved in the global space activities become and remain subject to the rule of international space law.

118 *Reparation for Injuries, supra* note 9, 178.
119 Fasan, *supra* note 98, 54 [emphasis in original].